93-672

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

DEON L. THOMAS,

Petitioner,

v.

BRUCE PEARL, Individually and in his representative capacity as Assistant Basketball Coach of the University of Iowa,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Title III of the Omnibus Crime Control and Safe Streets Act creates a cause of action for damages against a party to a telephone conversation who records that conversation with tortious intent. Summary judgment was granted and upheld against petitioner not because he failed to support a finding of tortious intent, but because he failed to prove the commission of another tort independent of Title III.

The question presented is:

Whether granting summary judgment because a plaintiff has not proved that the defendant committed another tort independent of Title III emasculates Congress' purpose of creating a reasonable expectation of privacy in telephone conversations.

PARTIES TO PROCEEDING

The petitioner is Deon L. Thomas.

The respondent is Bruce Pearl, individually and in his representative capacity as Assistant Basketball Coach of the University of Iowa.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered on July 1, 1993.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 998 F.2d 447 (7th Cir.

1993). A copy of the opinion is included in the Appendix as Exhibit B.

JURISDICTION

Jurisdiction in this cause is premised upon 28 U.S.C. §1254(1) for review by certiorari of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit. Petitioners in the district court and in the Court of Appeals asserted federal claims based on the guarantees of 18 U.S.C. §§2510-2520. A written opinion was issued by that court on July 1, 1993. Petitioners sought rehearing, which the court denied on July 30, 1993.

The record in this cause was lodged with the United States District Court for the Central District of Illinois, Danville Division, Danville, Illinois, with the return of the mandate to that court on August 9, 1993. The United States Supreme Court has jurisdiction to review the decision of the United States Court of Appeals, however, regardless of the status of the mandate. *Carr v. Zaja*, 283 U.S. 52, 53 (1931); *Aetna Casualty Co. v. Flowers*, 330 U.S. 464, 468 (1947).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of 18 U.S.C. §§2510-2520 are set forth in the Appendix as Exhibit D.

STATEMENT OF THE CASE

Petitioner, Deon Thomas, filed a complaint in Illinois state court in July, 1991, against defendant, Bruce Pearl, alleging violations of the Illinois and federal wiretapping statutes. The case was removed to United States District Court for the Central District of Illinois, Danville Division, pursuant to defendant's motion on August 15, 1991. Petitioner based his complaint on defendant's covert tape recordings of defendant's telephone conversations with petitioner. Defendant never denied that he recorded petitioner's conversations without petitioner's consent. The complaint alleged that, due to defendant's secret recordings and subsequent disclosure of their contents, petitioner suffered an invasion of privacy rights protected by the federal wiretapping statute, 18 U.S.C. §§2510-2520, and falsely became subject to the appearance of impropriety.

In 1989, petitioner, Deon Thomas, was a senior and star basketball player at Simeon High School in Chicago, Illinois. At that time, petitioner was being recruited heavily by several schools, including the University of Iowa and the University of Illinois, to play basketball at the college level. Both the University of Illinois and the University of Iowa are member institutions of the National Collegiate Athletic Association (hereinafter referred to as "NCAA") and must abide by certain rules and regulations promulgated by the NCAA with respect to collegiate basketball recruitment.

In the Spring of 1989, defendant Bruce Pearl, Assistant Basketball Coach for the University of Iowa,

attempted to recruit petitioner for Iowa's men's basketball team. From December of 1988 to April of 1989, defendant engaged in numerous telephone conversations with petitioner regarding the recruiting activities of other universities, specifically the University of Illinois and Illinois Assistant Basketball Coach Jimmy Collins. During these conversations, defendant alleged that he became aware of possible violations of NCAA rules by the University of Illinois.

Without the authorization of either the NCAA or the University of Iowa, defendant obtained recording equipment to record his conversations with petitioner and petitioner's family and friends. With this equipment, defendant recorded all or part of nine conversations without the knowledge or consent of the parties. One of these recorded conversations occurred on April 9, 1989, in which the defendant elicited statements from petitioner which appeared to implicate petitioner in NCAA recruiting violations regarding his recruitment by the University of Illinois.

At the time that defendant began his covert tape recording activities in April of 1989, there was no pending NCAA investigation of either the University of Illinois or petitioner. On April 12, 1989, petitioner signed a letter of intent to attend the University of Illinois. In a "Strategy" memo to the University of Iowa Athletic Director, Bump Elliot, dated May 5, 1989, Defendant outlined his intentions to notify the NCAA of his recordings in June of 1989, prior to petitioner's arrival for summer school at the University of Illinois. Also in the memo, defendant spoke of discussing certain "conditions" with the NCAA prior to turning over the information he

claimed to have gathered and his preference to work with an NCAA official that he knew personally, namely Rich Hilliard, a member of the NCAA Enforcement Staff and a college friend of defendant.

Defendant played the recordings for Hilliard in June of 1989 and turned them over to Hilliard in August of 1989. As a result of the information and tape recorded conversations defendant provided to Hilliard, the NCAA began a formal investigation of the recruitment of petitioner by the University of Illinois.

On April 6, 1992, defendant filed a motion for summary judgment and supporting memorandum. The defendant argued that he could not have violated the federal wiretapping statute because he was acting under color of law and the statute provides that it is not unlawful for a person acting under color of law to intercept a communication where that person is a party to the communication. 18 U.S.C. §2511(2)(b). The district court granted defendant's motion for summary judgment on July 1, 1992. The district court ruled that defendant had acted under color of law because he was an employee of a state university.

The district court went on to say that, even if defendant had not acted under color of law, he still could not be sued under 18 U.S.C. §2511 because that statute excepts from liability those who intercept a communication to which they are a party if the interception is not done with criminal or tortious intent. 18 U.S.C. §2511(2)(d). The district court read this to mean that a

plaintiff under 18 U.S.C. §2511 must prove that the defendant violated another law in addition to the federal statute.

On July 1, 1993, the Seventh Circuit issued an opinion affirming the district court's granting of the motion for summary judgment. The court ruled that the defendant had not acted under color of law, but held that, because the plaintiff had not pled and supported a separate cause of action under another law, he could not maintain an action under 18 U.S.C. §2511.

The Seventh Circuit denied petitioner's motion for rehearing on July 30, 1993.

REASONS FOR GRANTING THE WRIT

PETITIONER WAS NOT REQUIRED TO PROVE AN INDEPENDENT TORT TO SUPPORT A CLAIM UNDER 18 U.S.C. §§2510-2520, AND THE RULE 56 SUMMARY JUDGMENT AGAINST PETITIONER FOR FAILURE TO DO SO WAS THEREFORE ERRONEOUS.

This case presents an important issue for this Court to address regarding a conflict among the circuit courts of appeal over the scope of the expectation of privacy in telephone communications provided by Title III of the Omnibus Crime Control and Safe Streets Act, 18 U.S.C. §§2510-2520. Specifically, this conflict concerns the breadth of the statutory exception to liability provided by 18 U.S.C. §2511(2)(d). Contrary to the statute's unambiguous language and clear purpose, the federal court of appeals affirmed the summary judgment against petitioner under F.R.Civ.P. 56 because he failed to prove the

commission of a separate tort independent of Title III. This construction of 18 U.S.C. §2511(2)(d) emasculates the statute's protection against the surreptitious recording of telephone conversations, rendering it duplicitous and ineffectual, and was explicitly rejected by the United States Court of Appeals for the Sixth Circuit in *Stockler v. Garratt*, 893 F.2d 856 (6th Cir. 1990).

1. The Importance of Consistency in the Interpretation of the Federal Wiretapping Standard

Title III of the Omnibus Crime Control and Safe Streets Act, the federal wiretapping statute, forms the cornerstone of telecommunications privacy law in the United States. It creates civil and criminal liability for intentionally intercepting, using or disclosing the contents of "any wire, oral, or electronic communication." 18 U.S.C. §2511(1)(a), (c) (establishing violation); 18 U.S.C. §2520 (providing for civil damages). "Intercepting" includes recording. 18 U.S.C. §2510(4). The statute creates an exception, however, for the recording of a communication by a party to that communication (participant monitoring) "unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. §2511(2)(d).

It is important that this Court resolve the conflicting interpretations of §2511(2)(d) because the federal wiretapping statute plays a foundational role in creating an expectation of privacy against participant monitoring. The expectation of privacy in telephone communications derives from three layers of law, each building upon the

layer underneath. First, the Fourth Amendment creates a bottom foundation, a minimum requirement. This Court has made clear that the Fourth Amendment does not protect any privacy interest against participant monitoring. *Lopez v. United States*, 373 U.S. 427 (1963).

Second, the federal wiretapping statute builds upon this layer, creating a greater expectation of privacy than that afforded by the Fourth Amendment. The protection of privacy in the face of great advances in electronic surveillance technology was the overriding concern of Congress in enacting Title III. S. Rep. No. 1097, 90th Cong., 2d Sess. (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2153-58; *Gelbard v. United States*, 408 U.S. 41 (1972). The statute applies to private parties, unlike the Fourth Amendment, and also protects a privacy interest against the recording of a conversation by a party thereto. 18 U.S.C. §2511(1), (2)(d). The statute limits this privacy interest against participant monitoring to situations where the wiretapper records the conversation with criminal or tortious intent. 18 U.S.C. §2511(2)(d).

The federal statute serves as the foundation for the third and final layer, state law. States can expand the privacy interest created by Title III but may not water down the federal safeguards. *United States v. Mora*, 821 F.2d 860, 863 n.11 (1st Cir. 1987). Because of its role in providing minimum guarantees against participant monitoring, the federal statute is a common thread which runs through all of these laws. It defines their legal boundaries, but also serves as an authoritative statement of what privacy expectation is reasonable in the context of participant monitoring, tending to create continuity among the states. Many states' statutes directly emulate

the federal provisions regarding participant monitoring.[1] Several go beyond the federal guarantees and require that all parties to a conversation consent to any recording.[2] Several others, however, have been so influenced by Title III that their courts have interpreted statutes which clearly require that all parties consent to a recording to actually duplicate the more limited federal standard.[3]

2. The Conflict

The conflict in interpretations of §2511(2)(d) between the Sixth and Seventh Circuits weakens the structure of participant monitoring law by injecting uncertainty into its very foundation: the federally guaranteed expectation of privacy. The two circuits have very different views about what Title III protects.

The Sixth Circuit believes that the statute protects against the secret recording by a party to a conversation

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[1] *See, e.g.*, Idaho Code §18-6702 (1987); Minn. Stat. Ann. §626A.02 (West Supp. 1993); Neb. Rev. Stat. §86-702 (Supp. 1992); N.J. Stat. Ann. §2A:156A-3, A-4 (West Supp. 1993); Ohio Rev. Code Ann. §2933.52 (Anderson 1993); R.I. Gen. Laws §11-35-21 (1981); Tex. Penal Code Ann. §16.02 (West Supp. 1993); Wis. Stat. Ann. §968.31 (West Supp. 1992).

[2] *See, e.g.*, Cal. Penal Code §631(a) (West Supp. 1993); Mass. Gen. Laws Ann. ch. 272, §99 (West 1970); Wash. Rev. Code Ann. §9.73.030(1)(b) (West 1989).

[3] *See, e.g., U.S. v. Vespe*, 389 F. Supp. 1359 (D. Del. 1975) (interpreting statute currently codified at Del. Code Ann. tit. 11, §1336 (Supp. 1993)), *aff'd*, 520 F.2d 1369 (3d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976); *People v. Beardsley*, 503 N.E.2d 346 (Ill. 1986) (interpreting statute currently codified at 720 Ill. Comp. Stat. Ann. 5/14-2 (West 1993)); *Sullivan v. Gray*, 324 N.W.2d 58 (Mich. Ct. App. 1982) (interpreting Mich. Comp. Laws Ann. §750.539c (West 1991)).

who has a criminal or tortious intent at the time the recording is done. *Stockler v. Garratt*, 893 F.2d 856, 859 (6th Cir. 1990). Under the Sixth Circuit's view, the violation of Title III is complete at the time when the party records the conversation. Thus, it is irrelevant whether or not that party eventually actually *uses* the recording to commit a crime or tort. *Id.*

In *Stockler*, an attorney for a debtor in a pending bankruptcy persuaded his client to tape record conversations his client had with an attorney for creditors, in the hopes of later being able to use the recording to "leverage" the creditors' attorney into accepting a lower settlement. *Id.* at 858. The recording was never used against the creditors' attorney in any way. The Sixth Circuit reversed a summary judgment for the defendant, relying on the unambiguous language of §2511(2)(d):

> Looking to the plain language of the statute as it applies to a person not acting under color of law, it requires an interception or procurement of an interception by a person and a criminal or tortious purpose on the part of the interceptor or procurer. The statute does not by its terms, to create liability, provide that the recording actually be used. This omission cannot be assigned to a scrivener's error and, of course, if actual use was intended to be required, Congress can readily amend the statute to so provide. While we recognize that, without requiring use of the interception, it will be a problem, as here, to determine the purpose, it can hardly be said that, as written, the statute does not make sense.

Id. at 859. In so holding, the Sixth Circuit expressly rejected the Seventh Circuit's reasoning in *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956 (7th Cir. 1982) (Posner, J.).

In *By-Prod Corp.*, an officer of a corporation tape recorded a telephone conversation he had with the employee of another corporation in the same industry, during which the employee allegedly invited the officer to join a conspiracy in violation of antitrust laws. 668 F.2d at 959. The officer, however, erased the tape before he ever listened to it. The Seventh Circuit, after finding that the plaintiff had not proved tortious intent, went on to state:

> We doubt anyway that a tape recording which was never used could form the basis for liability under section 2511(2)(d). It would be a dryly literal reading of the statute that found a violation because at the moment of pressing the "on" button a party to a conversation conceived an evil purpose though two seconds later he pressed the "off" button and promptly erased the two seconds of tape without even playing it back. A statute that provides for minimum damages of $1000 per violation must have more substantial objects in view than punishing evil purposes so divorced from any possibility of actual harm. We think it is the use of the interception with intent to harm rather than the fact of interception that is critical to liability, and there was no use of the interception here.

Id. at 960.

The Seventh Circuit applied this reasoning in the instant case. The court's entire analysis revolved around petitioner's failure to prove the elements of a separate action in tort. *Thomas v. Pearl*, 998 F.2d 447, 452-453 (7th Cir. 1993) (App. 11-13). Because Thomas was unable to establish a successful claim for any other tort, the Seventh

Circuit ruled that he could not establish liability under the federal act.

The Seventh Circuit's approach to §2511(2)(d) in this case, which is based on the reasoning of *By-Prod Corp.*, is patently wrong. The plain meaning of the statute's language contradicts this approach. Also, requiring the plaintiff to prove that the defendant in a participant monitoring case committed a separate additional tort emasculates Title III by ignoring the statute's purpose, to create and protect an expectation of privacy, and by taking out the statute's teeth as providing an independent cause of action, rendering it a useless, duplicative law.

First, the plain meaning of the language of §2511(2)(d) contradicts the Seventh Circuit's approach. That provision states:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication *is intercepted for the purpose of* committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. §2511(2)(d) (emphasis added). The action prohibited by the statute is the interception of a communication. This action must be taken with the requisite criminal or tortious purpose, but no further action is required under the plain words of the statute. Where a statute's language is unambiguous, a court's sole function is to

enforce it as it is written. *West Virginia University Hospitals, Inc. v. Casey,* 111 S.Ct. 1138 (1991). The Seventh Circuit's approach adds requirements that Congress did not include in the unambiguous language of §2511(2)(d) and so is erroneous.

Second, the Seventh Circuit's approach emasculates the statute's purpose in limiting participant monitoring. Title III created a privacy interest against the nonconsensual recording of a person's voice that did not exist before. Its stated purpose was to protect "the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of interstate commerce". Pub. L. 90-351, 82 Stat. 197 §801(b) (1968), *reprinted in* 1968 U.S.C.C.A.N. 237, 253. As Americans began to utilize electronic modes of communication more and more, Title III sought to create privacy rights to protect people from interceptions made possible by advancing technology. It is wrongful *interception* at which the statute is aimed. 18 U.S.C. §2511(1)(a), (b). Title III defines "interception" as "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device." 18 U.S.C. §2510(4). The statute thus takes the view that the improper acquisition of a communication violates a reasonable expectation of privacy.

The Seventh Circuit in *By-Prod Corp.* and the instant case fails to comprehend the interest that Title III seeks to protect. Title III recognizes that people have a privacy interest in not having their voices recorded by those who seek to do them harm. The court may feel that there are

"more substantial objects [for such a statute] than punishing evil purposes so divorced from any possibility of actual harm", but that is not for the court to decide. Congress felt otherwise and passed a law to address its concerns. The only role left to the court is to apply that law as written.

Finally, the Seventh Circuit's approach emasculates Title III's guarantees against improper participant monitoring by removing all of its force as an independent provision. If a party to a conversation violates Title III only if he or she also violates another criminal or civil law, then the provision is duplicative and useless. Title III then would only add extra requirements to an existing cause of action. Congress did not intend such an absurd result. Neither the language nor the purpose of the statute requires this emasculating interpretation.

In the instant case, the faulty *By-Prod Corp.* analysis under §2511(2)(d) prevented both the district court and the Seventh Circuit from giving full consideration to the true dispositive issue: the defendant's intent at the time he recorded petitioner's telephone communication. The district court never mentioned the defendant's intent and, in fact, appeared to take petitioner's allegations of tortious intent as true. *Thomas v. Pearl*, 793 F. Supp. 838, 842 (C.D. Ill. 1992) (App. 23-24) (stating that "[e]ven if the facts as Thomas presents them are true[, that Pearl's intent in recording the telephone conversations was 'to interfere with Plaintiff's prospective advantage and to invade Plaintiff's right of privacy',] Pearl would still be entitled to summary judgment because Thomas did not prove that he violated any other law"), *aff'd*, 998 F.2d 447 (7th Cir. 1993).

The Seventh Circuit, in place of a full examination of intent, substituted a cursory nutshell overview of what other causes of action petitioner may have properly pled. *See Thomas*, 998 F.2d at 452-53 (App. 11-13). Indeed, in the middle of its §2511 analysis, the Seventh Circuit makes an offhand remark about the defendant's intent, offering no evidentiary support and seemingly treating it as a given presumption: "Pearl's intent was not to embarrass Thomas but to call attention to unfair and illegal practices by a rival university." *Id.* at 452 (App. 12). Then, not even realizing the revelatory significance of what it just stated, the court went on to look at petitioner's possibilities under two more causes of action. *Id.* The Seventh Circuit, thus, treated the defendant's intent not only as presumptively angelic, but also as a nonissue. Because it continued its search for the defendant's tortious intent after it had already foreclosed the issue, obviously the court did not even know what the proper object of its search was.

The Seventh Circuit's misguided and superficial intent analysis cannot be sufficient. The issue of defendant's intent is a delicate inquiry on summary judgment. *See Hardin v. Pitney-Bowes, Inc.*, 451 U.S. 1008 (1981) (Rehnquist, J., dissenting from denial of cert.) (stating that "it is inappropriate to resolve issues of credibility, motive, and intent on motions for summary judgment"); *Hutchinson v. Proxmire*, 443 U.S. 111, 120 n.9 (1979) (stating that "[t]he proof of 'actual malice' calls a defendant's state of mind into question and does not readily lend itself to summary disposition" (citations omitted)). Because plaintiffs cannot easily refute self-serving affidavits of the party moving for summary judgment without the opportunity for cross-examination, "the court

must be particularly vigilant to draw *every* reasonable inference from the evidence in the record in a light most flattering to the nonmoving party." *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1266 (5th Cir. 1991) (court's emphasis), *cert. denied*, 112 S.Ct. 936 (1992).

Examined in the light most favorable to petitioner, the record in this case contains ample evidence from which a reasonable jury could infer that, at the time he secretly recorded petitioner's telephone conversation, the defendant intended to injure petitioner in a tortious manner by placing him in a false light. A person places another in a false light when he or she (1) publicizes a matter concerning the plaintiff, (2) that publication places the plaintiff in a false light which would be highly offensive to a reasonable person, and (3) the defendant had knowledge of or acted in reckless disregard for the falsity of the publication and the false light in which it would place the plaintiff. *Lovgren v. Citizens First Nat'l Bank of Princeton*, 534 N.E.2d 987, 989 (Ill. 1989).

At the time he made the recording, the defendant must have known that the subject matter of the conversation, that the petitioner, Deon Thomas, was involved in NCAA violations stemming from alleged offers from the University of Illinois, undoubtedly concerned the plaintiff and, if publicized, would tarnish his reputation in a way that would be highly offensive to a reasonable person. The only question is whether the defendant knew or acted in reckless disregard for the falsity of these allegations and the false light in which their publication would place the plaintiff. In defamation law, this level of intent is known as "actual malice". *Harte-Hanks Communications, Inc. v. Connaughton*, 109 S.Ct. 2678, 2685 (1989). "Reckless

disregard" means a high degree of awareness of the probable falsity of the matter or entertaining serious doubts as to its truth. *Id.* at 2685-86.

A reasonable jury could infer from the record that the defendant, Bruce Pearl, knowing or entertaining serious doubts as to the truth of the alleged violations, orchestrated his conversation to mislead the petitioner into agreeing with the defendant's leading questions regarding these violations. "[I]t is not necessary to prove it [malice] by extrinsic evidence. It may be inferred from the relation of the parties, the circumstances attending the publication, and even from the terms of the publication itself." *Dorin v. Equitable Life Assurance Soc'y of the United States*, 382 F.2d 73, 76-77 (7th Cir. 1967) (quoting *Flannery v. Allyn*, 221 N.E.2d 89, 97 (Ill. App. Ct. 1966), *cert. denied*, 388 U.S. 912 (1967)). Here, the relation of the parties, the context of the recording, and the terms of the recording itself indicate Pearl's doubts as to the veracity of the allegations.

First, the relation of the parties at the time of the recording indicates the untrustworthiness of the matters asserted therein. The defendant, Bruce Pearl, was an experienced college basketball recruiter for the University of Iowa. His job required that he be aggressive and adept at convincing high school athletes to agree with his assertions. The petitioner, Deon Thomas, was a young, unsophisticated high school athlete whose personality was one of natural acquiescence. The relationship between the parties created a situation ripe for the defendant to manipulate the petitioner to agree with his assertions.

Next, the context at the time of the recordings made it likely that Pearl would take advantage of his manipulative relationship with the petitioner. Deon Thomas, after skipping his official visit to the University of Iowa, had just signed with the University of Illinois. Pearl was embarrassed and embittered. In a subsequent taped conversation with Renaldo Kyles, a friend of Thomas whom Pearl was using as a contact to help persuade Thomas to go to Iowa, Pearl stated:

> I feel betrayed too now, you know, I mean stake my job and my reputation on the fact that he [Thomas] was coming to Iowa, and if he doesn't even come in and visit, it's going to make me look real bad. But, you know, TD [Iowa Head Basketball Coach Tom Davis] knows how close he was and that's the most important thing to me. I mean, not that it was close, but it was just that I wasn't imagining things. You know, a lot of people are really going to think that we just flat out imagined that he was wanting to come to Iowa. He's wanted Iowa since he was a sophomore.

Later in the conversation, Pearl discussed a plan to commence an NCAA investigation into the recruitment of Thomas by the University of Illinois:

> PEARL: But the second thing is if you still want to help Iowa, there's a chance we could still get him because I mean shit, like I said, forget about proving the money, we can't prove the money. We can't prove the offer. Unless of course Deon wants to say it happened and he's not going to want to do that. But if they visited with him last week, and I think that would be the one thing for you to get again clear in your

mind, that would be the one piece of information you could ask him is when did [University of Illinois coaches] and the grandmother go out to dinner. Because Clem [Haskins, University of Minnesota Head Basketball Coach] told me they went out to dinner, but if you can tell me the date, and if it was for sure after Sunday, after the City Suburban game, that letter could be . . . would be invalid Renaldo. I'm telling you right now. And, in fact, do me a favor.

KYLES: Okay.

PEARL: You want to do me . . . you want to do this?

KYLES: Yeah.

PEARL: Are you sure?

KYLES: Yeah.

PEARL: Find out where they went to eat.

Pearl, in this conversation, displays his manipulative skills in convincing Renaldo Kyles, another young high school athlete, to join a plan to taint Thomas' recruitment by Illinois. Pearl was bitter about losing Thomas and was willing to grasp at any straw to try and spoil Thomas' chances at Illinois.

This conversation, taped after the April 9, 1989, conversation in which Thomas seemed to implicate himself in NCAA violations, also shows that *Pearl himself entertained serious doubts about the veracity of Illinois' violations in recruiting Thomas.* In another conversation with Renaldo Kyles that was taped after the April 9, 1989, conversation with Thomas, Pearl stated:

> PEARL: Well, I'll tell you something right now Renaldo, if he had dinner last week with Illinois, that letter [signing with Illinois] is invalid. Forget about the money, okay? Because *the money is something that we can't prove.*
>
> KYLES: Right.
>
> PEARL: No matter who says it, no matter, you know, Deon told me, his mother told me. *We can't prove it.* But if they took him out to dinner after the signing period was over, after the contract period was over, he cannot go to Illinois.

(Emphasis supplied). Pearl himself obviously doubted the veracity of the allegations, even after the taped conversation with Thomas in which the allegations appeared.

Finally, the recorded statements themselves show the manipulation that Pearl employed to elicit Thomas' seemingly incriminating comments. This taped conversation occurred on Sunday evening, April 9, 1989, at 7:07 p.m.

At first, Pearl played a game with Thomas by not identifying himself and having Thomas try to recognize his voice. Pearl joked, "That's not the first time I've gotten you on that one." After Pearl asked about Thomas' family and announced that Renaldo Kyles had been to Iowa that weekend, Thomas stated that he was just about to do his homework. Pearl, however, persisted with his agenda. After asking Thomas if he were alone, Pearl initiated his inquiry, in which he used leading questions to elicit every response Thomas gave.

The tape of this conversation supports a reasonable inference that Thomas was badgered into his responses by Pearl. Thomas answered more than 19 questions with

nothing but "uh-huh" and the like, verbal equivalents of agreeing nods. The only information Thomas volunteered in the conversation was that he had homework to do. In all other respects, the topics and the questions were at the suggestion of Bruce Pearl. This leading manner of questioning has always been considered suspect as tending to elicit false answers. *See* Michael H. Graham, *Handbook of Federal Evidence*, §611.8 n.4 (3rd ed. 1991); Denroche, *Leading Questions*, 6 Crim. L.Q. 21, 22 (1963). A reasonable interpretation of this conversation is that Deon Thomas is an accommodating, agreeable young man who is easily manipulated.

The suspicious character of the conversation, combined with Pearl's manipulative relationship with Thomas and bitterness at Thomas's rebuke of the University of Iowa, support a reasonable inference of tortious intent by Pearl. The Seventh Circuit, following its faulty analysis of 18 U.S.C. §2511(2)(d), did not discuss any evidence of Pearl's motivation in recording Thomas's telephone conversation. These pertinent facts on the key issue in the case were not evaluated in any way by the court. The Seventh Circuit's superficial and incorrect analysis resulted in an erroneous summary judgment against petitioner.

CONCLUSION

In its opinion below, the Seventh Circuit Court of Appeals improperly upheld the district court's grant of a motion for summary judgment against petitioner. The Seventh Circuit's flawed analysis caused the court to

bypass meaningful inquiry into defendant's intent, the very basis for liability under the federal wiretapping statute, in search of a separate violation of some other law. This construction emasculates Title III's protection of privacy in telephone conversations and directly conflicts with the Sixth Circuit's construction. This case presents significant issues worthy of this Court's consideration. Certiorari should be granted to review and reverse the holding of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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October 1993

APPENDIX

EXHIBIT A

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

July 30, 1993.

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. ILANA D. ROVNER, Circuit Judge

DEON L. THOMAS, Plaintiff-Appellant, No. 92-2709 vs. BRUCE PEARL, individually and in his representative capacity as Assistant Basketball Coach of the University of Iowa, Defendant-Appellee.	Appeal from the United States District Court for the Central District of Illinois, Danville Division. No. 91-C-2308 Harold A. Baker, *Judge.*

ORDER

On consideration of the petition for rehearing filed by plaintiff-appellant on July 22, 1993, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

EXHIBIT B

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 92-2709

DEON L. THOMAS,

Plaintiff-Appellant,

v.

BRUCE PEARL, individually and in his representative capacity as Assistant Basketball Coach of the University of Iowa,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of Illinois, Danville Division.
No. 91-C-2308-**Harold A. Baker,** *Judge.*

ARGUED FEBRUARY 22, 1993 – DECIDED JULY 1, 1993

Before CUMMINGS, CUDAHY and ROVNER, *Circuit Judges.*

CUMMINGS, Circuit Judge. Six-foot-nine-inch All-American Deon Thomas was the kind of high school basketball prospect who could make college coaches salivate – or worse. The University of Illinois was so eager to see Thomas wearing a Fighting Illini jersey that an assistant coach allegedly offered the high school student $80,000

and a Chevrolet, and promised to move his grandmother into a new apartment, if he would agree to accept the school's offer of a full scholarship.[1] The charges against Illinois were made public by a Big Ten rival college also interested in Thomas' talents on the court, the University of Iowa. The National Collegiate Athletic Association ("NCAA") investigated Iowa's charges and, though it dismissed the two most serious allegations about a car and cash, found a number of other violations including car loans by boosters and free tickets to NCAA tournaments. As punishment, the NCAA banned Illinois from the 1991 NCAA tournament, limited to two the number of basketball scholarships it could offer in 1991-1992 and 1992-1993, prohibited the school from playing outside the United States in 1991, and severely restricted recruiting. The school's internal investigation also led to a freeze on coaches' salaries.[2] Thomas, meanwhile, sat out his freshman year while the investigation was pending.

Now Thomas, seeking vindication of sorts, is suing Bruce Pearl, the assistant basketball coach at Iowa who first charged Illinois with offering illicit incentives to recruits.[3] According to Thomas, Pearl surreptitiously taped phone conversations he had with Thomas and Thomas' friends and relatives in violation of the federal

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[1] "Basketball Team Penalized After Recruiting Inquiry," N.Y. TIMES, Nov. 11, 1990 at A 52.

[2] Mark Asher, "Illinois Basketball Gets Three Years' Probation; NCAA Cuts Illini Out of NCAA Tournament," WASH. POST, Nov. 8, 1990 at B-3.

[3] Pearl is now head coach at Southern Indiana in Evansville and Thomas has gone on to become a successful player at Illinois.

wiretapping statute, 18 U.S.C. §§ 2510-2520, and the Illinois Eavesdropping Statute, 720 ILCS 5/14-3. Thomas filed a two-count complaint in Champaign County, Illinois. The defendant had it removed to federal court in the Central District of Illinois based on federal question jurisdiction. Because neither the federal nor the state wiretapping statutes apply to Pearl's conduct, we affirm the district court's grant of summary judgment in his favor.

In late 1988, Coach Pearl began efforts to recruit Thomas to the University of Iowa. As part of the negotiations, Thomas told Pearl about his dealings with other colleges and universities. According to a memo prepared for his superiors, Pearl learned from Thomas in December 1988 that an Illinois coach had offered to move the recruit's grandmother to a nicer apartment. "I asked Deon how he felt about the offer and also why he was telling me. He said that at first he was insulted. He prides himself on being honest and religious. However, the idea of helping his grandmother very much appealed to him" (defendant's supp. app. at 19). Pearl believed correctly that such an offer, if it had been made, violated NCAA regulations. Fred Mims, Associate Athletic Director at Iowa and the NCAA compliance officer on campus, gave Pearl a tape recorder with a telephone attachment and told the coach to document Thomas' statements. Between April and July 1989, Pearl made at least ten calls to Thomas or to Thomas' friends or relatives. During these conversations Thomas discussed the various perks, including cash, which had been offered to him and other recruits by the University of Illinois. According to Pearl's affidavit, Pearl played the tapes for just two individuals other than his superiors at Iowa: an NCAA enforcement

officer, as he was required to do upon request under NCAA rules, and a University of Illinois attorney.

Thomas' first claim is that Pearl violated the federal law against wiretapping. That statute creates civil and criminal liability for intentionally intercepting or disclosing the contents of any "wire, oral, or electronic communication." 18 U.S.C. § 2511(1)(a)(c).[4] The district court

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[4] The statute provides in part:

(1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;

* * *

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; * * *

shall be punished * * *

* * *

(2) * * * (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

found that the ban on wiretapping did not apply to Pearl's actions because of two exceptions in the law. We agree that the coach is not liable under § 2511, but our analysis differs significantly from the district court's. The wiretapping law's first exemption is for "a person acting under color of law * * * where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c). The district court found that, as an assistant basketball coach at a state university, Pearl acted "under color of law" when he taped conversations with Deon Thomas and Thomas' friends and relatives. We disagree.

Traditionally – that is, before the Supreme Court's 1961 decision in *Monroe v. Pape*, 365 U.S. 167, overruled on other grounds, *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 – the phrase "under color of law" referred to state officials who exercised power "possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." *United States v. Classic*, 313 U.S. 299, 326. See Eric H. Zagrans, " 'Under Color of *What* Law: A Reconstructed Model of Section 1983 Liability," 71 Va. L. Rev. 499, 500-501 (1985). In *Monroe* the Court found that color of law, as it is used in the Civil Rights Act of 1871, 42 U.S.C. § 1983, includes not just fully authorized acts by state officials but acts committed by officials exceeding their authority. 365 U.S. at 172. Thus, for example, a person beaten by the police may allege a constitutional infringement against the officer even though the beating was not authorized or sanctioned in any way by the police department. At times the connection between the state and the

person acting under color of law has been quite attenuated – for example, a paid informer who receives the aid of police officers is held to the same constitutional standards as the officers themselves. *Hoffa v. United States,* 385 U.S. 293, 311. *Polk County v. Dodson,* 454 U.S. 312, 318-319, which held that a public defender does not act under color of law, is the only Supreme Court case in which a government employee performing tasks essential to his position was exempt from § 1983 liability. *West v. Atkins,* 487 U.S. 42, 50.

The phrase "under color of law" in § 1983 actions is now so broad that it means the same thing as "state action." *Lugar v. Edmonson Oil Co.,* 457 U.S. 922, 935. Normally, mere employment by the state is sufficient to convert a defendant into a state actor. *Id.* at 935-936, n.18. That, of course, includes a basketball coach who receives paychecks from the state treasury. Clearly, Pearl as a state employee would have acted under color of law if Thomas were alleging that the coach violated his constitutional rights in a § 1983 action. But that is not this case. Rather, Thomas alleges that Pearl violated § 2511 of the federal wiretapping act, and Congress has not said whether color of law means the same thing in § 2511 as it does in § 1983. The district judge thought so. According to the trial court, state action and color of law are equivalent in the wiretapping context because "the Supreme Court had already attributed to the phrase 'under color of law' a meaning basically synonymous with state action, and Congress presumably knew of that meaning and did not object to it." We do not agree. Even if it were evident that congressional silence signalled active approval of the case law interpreting color of law, that case law is ambiguous at

best because nearly all decisions have been quite careful to restrict their generous definitions of color of law to the civil rights arena.

In *Lugar,* for example, the Supreme Court emphasized that it was equating state action and color of law in § 1983 only because to do otherwise "would substantially undercut the congressional purpose in providing the § 1983 cause of action." *Id.* at 935. And in discussing the meaning of the phrase in *West v. Atkins,* the Court carefully noted that state action equals color of law only in the special circumstances of § 1983 suits. 487 U.S. at 49. Moreover, the majority opinion in *Lugar* stated in a footnote that state action and color of law are not always equivalent just because they are the same for purposes of § 1983:

> [A]lthough we hold in this case that the under-color-of-state-law requirement does not add anything not already included within the state-action requirement of the Fourteenth Amendment, § 1983 is applicable to other constitutional provisions and statutory provisions that contain no state-action requirement. Where such a federal right is at issue, the statutory concept of action under color of state law would be a distinct element of the case not satisfied implicitly by a finding of a violation of the particular federal right.

457 U.S. at 935 n.18.

Moreover, the Civil Rights Act of 1871, unlike the wiretapping act, is a remedial statute intended to be as broad as the Fourteenth Amendment. *Id.* at 934. Liberal interpretations of § 1983's color of law language have the

effect of increasing the number of people who can sue. By giving a wide reading to the terms of the statute, the Supreme Court narrowed (if not almost completely eliminated) the immunity enjoyed by government officials in favor of individuals who have been allegedly harmed by the state. Contrast this with the wiretapping act where color of law is used not to create a cause of action for injured plaintiffs but to exempt certain state officials from liability for their behavior. In this context, the broadest reading of color of law would hinder, rather than further the essential purpose of the act: to protect individuals from invasions of privacy. See *Gelbard v. United States*, 408 U.S. 41, 47-50.

In the wiretapping setting, conflating color of law and state action would confer on every last employee of federal, state and local government a free pass to record conversations without the second party's consent. Most cases that arise under the wiretapping act involve law enforcement officers gathering evidence against suspected criminals. The exemption in § 2511 for officials acting under color of law was evidently designed to aid police in ensnaring lawbreakers, not to unleash upon society millions of government workers – armed with recording devices strapped to their phones – seeking to invade the privacy of individuals neither suspected nor accused of committing crimes. Also, if color of law means the same thing in § 2511 that it means in § 1983, police officers who secretly taped conversations without a warrant or the approval of their superiors would be free from criminal and civil liability. That cannot be what Congress intended.

We do not necessarily limit the "under color of law" language in § 2511 to law enforcement officers acting within the scope of their authority. Yet there must be some logical and reasonable connection between the government worker's job description and eavesdropping. Society simply has no expectation that basketball coaches will wiretap their conversations with high school recruits, no matter the extenuating circumstances. Thomas argues that he acted with the approval of his superiors, but that is beside the point. We do not expect college administrators and athletic directors to wiretap, or sanction wiretaps, any more than basketball coaches. Thus the district court's conclusion that Pearl acted under color of law cannot stand.

However, a second provision of § 2511 relieves any eavesdropper from liability who does not surreptitiously record conversations "for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or any State," where at least one party to the conversation consents.[5] This means Thomas must show that Pearl either intended to break the law or commit a tort against him in order to prove a violation of the federal statute. We agree with Judge Baker that Thomas has failed to establish either point, although our analysis again differs slightly from the district court's.

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[5] This sweeping provision drowns the rest of the statute and makes the first exception for persons acting under color of law redundant. As we noted above, one who acts under color of law in this context is by definition not breaking the law or committing a tort and is thus exempt from liability under either clause.

Thomas does not allege that Pearl has broken any laws other than the wiretapping law itself, which we presume does not destroy the exemption. Instead, Thomas argues that Pearl robbed him of his privacy and defamed him and should therefore be liable under § 2511. The complaint supports these contentions only in the most vague and haphazard manner. The district court dismissed Thomas' allegations almost in passing because he did not try to establish the elements of a cause of action in tort. Although inartful, Thomas' complaint could be read to state a cause of action for any of three privacy torts: (1) intrusion upon the seclusion of another; (2) publicity given to private life; and (3) publicity placing a person in a false light. *Lovgren v. Citizens First Nat'l Bank*, 126 Ill.2d 411, 416, 534 N.E.2d 987 (1989).

The tort of intruding upon the seclusion of another is aimed at discomfort caused by the intrusion itself – for example, someone enters your bedroom, *Byfield v. Candler*, 125 S.E. 905, 906 (Ga.App. 1924), opens your mail, *Birnbaum v. United States*, 588 F.2d 319, 323 (2d Cir. 1978), or makes repeated and unwanted telephone calls to you, *Harms v. Miami Daily News, Inc.*, 127 So.2d 715, 716-717 (Fla.App. 1961). Eavesdropping by wiretapping may itself constitute such an invasion of privacy. *Lovgren*, 126 Ill.2d at 417. In this instance, however, Thomas was harmed if at all not by the telephone calls themselves (since he was a willing party) or even by the recording, but by the publication of what he said in the conversations. And under *Lovgren*, a plaintiff fails to state a claim for invaded seclusion if the harm flows from publication rather than the intrusion. *Id.*

Nor is Thomas able to mount a claim that Pearl caused him unwarranted publicity, a second variety of privacy tort recognized in Illinois. To state such a cause of action, the plaintiff must prove that the defendant disclosed a personal matter in a way that would be highly offensive to a reasonable person and which is not a legitimate subject of public concern. Restatement (Second) of Torts § 652D (1977). Even assuming that Pearl's revelations would be highly offensive to a reasonable person, recruiting abuses by a public university are undoubtedly a matter of public interest. Pearl's intent was not to embarrass Thomas but to call attention to unfair and illegal practices by a rival university.

Finally, Thomas has failed to prove, or even suggest, how Pearl's actions put him in a false light. To state this cause of action a plaintiff must show that he was placed in a false light because of defendant's action, that the publicity would be highly obnoxious to a reasonable person, and that the defendant acted either knowing that the statements were false or with reckless disregard for the truth. *Kolegas v. Heftel Broadcasting Corp.*, 154 Ill.2d 1, 17-18, 60 N.E.2d 201 (1992). A doctored quotation may defame a person by attributing untrue factual assertions to the speaker or by suggesting a manner of speaking or a personal trait the speaker does not hold. *Masson v. New Yorker Magazine, Inc.*, 111 S.Ct. 2419, 2430. Yet we have no affidavits suggesting that Pearl's depiction of his conversations with Thomas were false; we have only an unsupported allegation that the quotes were not published in their entirety. Thus the coach could not have put Thomas in a false light. A party's accurate quoting of another's statement cannot defame the speaker's reputation since

the speaker is himself responsible for whatever harm the words might cause. For similar reasons, Thomas would be unable to establish a successful defamation claim against Pearl because one element of defamation is that the assertion about the plaintiff be false. Restatement (Second) of Torts § 558 (1977). The fact that a statement is true, or in this case accurately quoted, is an absolute defense to a defamation action. Restatement (Second) of Torts § 581A (1977).[6] Because Thomas cannot prove that Pearl intended to commit a tort against him, the coach is exempt from liability under the federal act.

Having failed to establish a federal violation, Thomas turns for solace to Illinois. Indeed, its eavesdropping statute at first glance appears broader than the federal law. The Illinois act provides civil penalties for a person who "uses an eavesdropping device to hear or record all or part of any conversation unless he does so with the consent of *all* of the parties to such conversation" (emphasis added). 720 ILCS 5/14-3. In *People v. Beardsley*,

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[6] Pearl might also have a privilege defense to a defamation suit because according to his affidavit the only two people (other than his superiors) for whom he played the tapes of his conversations were a lawyer for the University of Illinois and an NCAA official. It is a defense that the communication was privileged, and both communications compelled by law and communications to a lawyer in anticipation of potential litigation are protected. *Becker v. Philco Corp.*, 372 F.2d 771, 775 (4th Cir. 1967), certiorari denied, 389 U.S. 979; Restatement (Second) of Torts § 587 (1977). Whether Pearl's duty to report violations to the NCAA constitutes a legal obligation, and whether an NCAA investigation would count as an anticipated legal proceeding, are questions we need not address because of our resolution of other issues.

115 Ill.2d 47, 503 N.E.2d 346 (1986), however, the Illinois Supreme Court interpreted the universal consent requirement to apply only to the surreptitious taping of a conversation by someone who is not a party to that conversation. Thus in *Beardsley* a defendant sitting in the back of a police cruiser did not eavesdrop when he recorded the conversation of two officers in front because the officers had no expectation of privacy. As the state court said:

> [T]he eavesdropping statute was intended to protect individuals from the *surreptitious* monitoring of their conversations by the use of eavesdropping devices. * * * The statute is based on the assumption that if the parties to a conversation act under circumstances which entitle them to believe that the conversation is private and cannot be heard by others who are acting in a lawful manner, then they should be protected in their privacy.

Id. at 53. Although the instant case differs from *Beardsley* in that the plaintiff did not indicate any lack of interest in privacy by discussing personal matters in front of others, he did speak freely to Pearl, the person with the recording device. Under *Beardsley*, Pearl did not eavesdrop illicitly on Thomas because Thomas knew he was talking to Pearl. As the Illinois Supreme Court said, "In essence, the conduct at which the statute is aimed is that of listening in secret to what is said in private." *Id.* at 58. Pearl listened, but not in secret. We admit this is an odd interpretation of the Illinois statute, but even the plaintiff concedes that *Beardsley* is four-square against him. His only argument is that the case is wrongly decided. Even if we were to agree, we are not at liberty to disregard an

Illinois Supreme Court decision interpreting an Illinois statute. 28 U.S.C. § 1652.

Since Thomas has failed to state a claim under either the federal or Illinois wiretapping laws, the decision of the district court is affirmed.

EXHIBIT C

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

DEON L. THOMAS, Plaintiff, vs. BRUCE PEARL, individually and in his representative capacity as Assistant Basketball Coach of the University of Iowa, Defendant.	)	No. 91-2308

ORDER

(Filed July 1, 1992)

The plaintiff, Deon Thomas, is a student at the University of Illinois and a member of the University of Illinois men's basketball team. The defendant, Bruce Pearl, is an assistant basketball coach at the University of Iowa who tried to recruit Thomas to attend that school. In connection with the recruitment process, Pearl spoke with Thomas on the telephone and recorded their conversation. Thomas did not know that Pearl was recording their telephone conversation nor did he consent to the recording. Pearl disclosed the tapes of his conversation with Thomas to the National Collegiate Athletic Association ("NCAA") and, according to Thomas, he also disclosed them to officials at the University of Illinois. On the basis of the tape recorded conversation between Thomas and Pearl, the NCAA conducted an investigation of recruiting violations on the part of the University of Illinois. Thomas sued Pearl in state court for damages in

Count I under the Illinois Eavesdropping Statute, Ill. Rev. Stat. ch. 38 para. 14-1 *et seq.*, and in Count II under the federal wiretapping statute found in the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* Pearl removed the case to this court pursuant to 28 U.S.C. § 1441. This court has jurisdiction of the case under 28 U.S.C. § 1331. Pearl has moved for summary judgment. For the reasons discussed in this order, the court grants Pearl's motion on both counts.

Discussion

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Herman v. National Broadcasting Co., Inc.*, 744 F.2d 604, 607 (7th Cir. 1984), *cert denied*, 470 U.S. 1028 (1985). "[I]n determining whether factual issues exist, a reviewing court must view all the evidence in the light most favorable to the nonmoving party." *Black v. Henry Pratt Co.*, 778 F.2d 1278, 1281 (7th Cir. 1985). However, Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex*, 477 U.S. at 322. "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party

there is no 'genuine' issue for trial." *Mechnig v. Sears, Roebuck & Co.*, 864 F.2d 1359 (7th Cir. 1988).

I. The Federal Wiretapping Statute

Thomas claims that when Pearl recorded a telephone conversation he had with Thomas and disclosed the contents of that conversation, he violated the following provision of the United States Code:

> (1) Except as otherwise specifically provided in this chapter any person who –
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication; . . .
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire oral, or electronic communication in violation of this subsection;. . . .
>
> shall be punished [by civil or criminal liability].

18 U.S.C. § 2511(1)(a), (c). The statute, however, provides exceptions for situations where one of the parties to the intercepted conversation consents to the interception. 18 U.S.C. § 2511(2)(c) provides:

> It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or

> one of the parties to the communication has given prior consent to such interception.

There is no dispute that Pearl was a party to the telephone conversation at issue in this case. Pearl argues that as a basketball coach for the University of Iowa he was "acting under color of law" so that under § 2511(1)(c) he cannot be liable for recording the conversation. Thomas, on the other hand, argues that Pearl was not acting "under color of law" because he was not authorized by the State of Iowa to engage in wiretapping.

Congress has not been so kind as to define the term "under color of law," so its meaning must be gleaned from other sources. The court first observes that for the purposes of civil rights statutes such as 42 U.S.C. § 1983 and 18 U.S.C. § 242, acting "under color of law" is equivalent to "state action." *Lugar v. Edmonson Oil,* 457 U.S. 922, 929 (1982); *NCAA v. Tarkanian,* 109 S.Ct. 454, 457 n.4 (1988). If this were a civil rights action, therefore, Pearl's actions would undoubtedly have been "under color of law." Pearl was acting on behalf of the University of Iowa which is an agency of the State of Iowa. He would be a state actor even if his actions were unauthorized by state law. *Monroe v. Pape,* 367 U.S. 167 (1961). *Polk County v. Dodson,* 454 U.S. 312 (1981), is distinguishable. That case involved the unique situation of a public defender who, like Pearl, was employed by a government entity. However, unlike Pearl, because of the nature of her job, she was required to act independently and her actions in defending her clients could not be controlled by the state.

The court is aware that "under color of law" could mean something different in the federal wiretapping statute than it means in civil rights statutes. After all, labelling a party's actions as "under color of law" has vastly different consequences in the two types of statutes. Actions "under color of law" in the context of a civil rights statute expose the actor to liability. On the other hand, certain actions "under color of law" for purposes of the wiretapping statute do not give rise to liability even though those actions would otherwise have been illegal. Perhaps Congress had different purposes for the "under color of law" provisions in the two statutes.

Nonetheless, the court in this case will adhere to the meaning of "under color of law" that has been clearly established in the context of civil rights legislation. Most cases dealing with § 2511(2)(c) concern recordings made by law enforcement officers. Many cases also concern recordings made by private citizens who are acting under the direction of law enforcement officers. These cases have, for the most part, held that such informants are acting "under color of law" as long as there is sufficient government involvement. *See, e.g., United States v. Craig,* 573 F.2d 455, 476 (7th Cir. 1977); *United States v. Shields,* 675 F.2d 1152, 1156 (11th Cir. 1982); *United States v. Shedan,* 651 F.2d 336 (5th Cir. 1981). The analysis in *Craig* is similar to that in civil rights cases concerning whether a private individual is considered a state actor when he or she acts in concert with or under the direction of a state actor. *See, e.g., Ghandi v. Police Department of Detroit,* 823 F.2d 959, 963-64 (6th Cir. 1987) (a paid informant is a state actor if he "acted together with or has obtained

significant aid from [State] officials, or because his conduct is otherwise chargeable to the State.")

The facts of this case are somewhat unique. When Congress enacted § 2511(2)(c), it probably did not specifically consider that section's application to a basketball coach at a state university. Even if Congress was primarily concerned in § 2511(2)(c) with law enforcement activities, however, Congress probably did not mean to limit § 2511(2)(c) to the law enforcement context. Congress used the term "law enforcement" in other parts of the wiretapping statute. *See* 18 U.S.C. § 2517, 2518(1)(a). Therefore, if Congress had meant "law enforcement," it would have used that term rather than "under color of law."[1] In addition, when Congress enacted the wiretapping statute in 1968, the Supreme Court had already attributed to the phrase "under color of law" a meaning basically synonymous with state action, and Congress presumably knew of that meaning and did not object to it. *Monroe v. Pape*, 365 U.S. 167 (1961).

The court finds that Pearl was acting under color of law when he recorded the conversation with Thomas. Not

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[1] On the other hand, in contrast to the "under color of law" provision of § 2511(2)(c), 18 U.S.C. § 2512(2) provides:

> It shall not be unlawful under this section for . . . (b) an officer, agent, or employee of, or a person under contract with, the United States, a State, or a political subdivision thereof, in the normal course of the activities of the United States, a State, or political subdivision thereof, to. . . .

The court points out that any argument based on the assumption that Congress uses terms consistently must be taken with a grain of salt.

only did Pearl make the recording while attempting to recruit basketball players to the University of Iowa. He also did so at the direction of his superiors at the University of Iowa Athletic Department using equipment supplied by the University. The plaintiff contends that under *NCAA v. Tarkanian,* 109 S.Ct. 454 (1988), because Pearl claims to have made the recordings in order to comply with NCAA regulations, he was not acting under color of law. The plaintiff's reliance on *Tarkanian* is misplaced. That case held that the NCAA was not a state actor and therefore, the plaintiff could not maintain a § 1983 action against it. The plaintiff is correct that compliance with NCAA regulations alone does not transform Pearl into a state actor. However, it is undisputed that Pearl was also acting within the scope of his employment as assistant basketball coach at the University of Iowa.[2] Unquestionably,

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[2] As evidence that Pearl was not acting within the scope of his employment, and therefore not acting under color of law in making the recordings, the plaintiff cites a letter dated July 16, 1990 from Julia Mears, Assistant to the President of the University of Iowa to J. Steven Beckett, the plaintiff's attorney, Exhibit B, Affidavit of Doug Young. This letter was in response to a letter of July 11, 1990 from Mr. Beckett to Doug Young, Custodian of Records at the University of Iowa, in which the plaintiff's counsel requested Mr. Young to supply him with copies of the tape recorded conversations. In her letter, Ms. Mears states that the tapes are not in the University's possession but are in possession of Pearl's private attorney. The court agrees that this might be evidence that Pearl was not acting within the scope of his authority. However, it is not terribly persuasive. Nowhere does Ms. Mears state that the tapes were not the property of the University of Iowa. She merely states that on July 16, 1990, they were not in the University's possession. In fact, the letter indicates that she knew precisely which tapes Mr. Beckett was referring to and she knew the location of those tapes. This greatly

the plaintiff in *Tarkanian* could have maintained a § 1983 action against UNLV, even for actions that UNLV took in compliance with NCAA regulations.

Even if Pearl was not acting "under color of law," the court finds that Pearl is not liable under the federal wiretapping statute because his actions fall into the "consent" exception of 18 U.S.C. § 2511(2)(d), which provides:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

Thomas argues that § 2511(2)(d) does not apply to Pearl's actions because Pearl's intent in recording the telephone conversations was "to interfere with Plaintiff's prospective advantage and to invade Plaintiff's right of privacy." Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgment at 14. According to Thomas, Pearl:

> performed said acts of covert tape recording and disclosure of said telephone conversations with the intent to bring Plaintiff into public notoriety and to destroy the comfort of Plaintiff's life and

---

weakens the plaintiff's argument that the University of Iowa had no involvement with the tapes. Furthermore, the plaintiff has undermined any argument that Pearl was not acting within the scope of his employment by suing Pearl in his representative, as well as individual capacity.

> peace and tranquility of mind, and to thrust upon Plaintiff, unsought, unwarranted and undesired publicity and notoriety, utterly obnoxious to Plaintiff, and to annihilate and destroy the seclusion of Plaintiff's life.

Plaintiff's Complaint at 4.

Pearl argues, on the other hand, that his intent in recording the conversation was to expose the truth, not to harm Thomas. Even if the facts as Thomas presents them are true, however, under § 2511(2)(d), Pearl was entitled to record his telephone conversations with Thomas. Before it was amended, § 2511(2)(d) read:

> It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire or oral communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State *or for the purpose of committing any other injurious act.* (emphasis added).

Congress deleted the language "or for the purpose of committing any other injurious act" as part of the Electronic Communications Privacy Act of 1986. The legislative history of that Act makes clear that by deleting the "other injurious act" language, Congress intended to protect a party to a communication from liability for intercepting that communication unless by intercepting the communication, he or she is violating another law. According to the Senate report:

Under current Federal law it is permissible for one party to consent to the interception of a conversation unless that interception is for illegal, tortious or other injurious purposes such as blackmail. In numerous court cases the term "other injurious purposes" has been misconstrued. Most troubling of these cases have been attempts by parties to chill the exercise of first amendment rights through the use of civil remedies under this chapter. For example, in *Boddie v. American Broadcasting Co.*, 731 F.2d 333 (6th Cir. 1984), the plaintiff, whose conversations were recorded by a journalist, sued. Despite the consent of the reporter who was a party to the conversation, the plaintiff claimed that the recording of the conversation was illegal because it was done for an improper purpose, to embarrass her. . . . [I]t is clear from the facts of the case that the term "improper purpose" is overly broad and vague. The court's opinion suggests that if the network intended to cause "insult and injury" to plaintiff Boddie, she might be entitled to recover. This interpretation of the statute places a stumbling block in the path of even the most scrupulous journalist. Many news stories have been brought to light by recording a conversation with the consent of only one of the parties involved – often the journalist himself. Many news stories are embarrassing to someone. The present wording of section 2511(2)(d) not only provides such a person with a right to bring suit, but it also makes the actions of the journalist a potential criminal offense under section 2511, even if the interception was made in the ordinary course of responsible news-gathering activities and not for the purpose of committing a criminal act or a tort.

> Such a threat is inconsistent with the guarantees of the first amendment. Insomuch as [this statute] continues to prohibit interceptions made for the purpose of committing either a crime or a tort (including defamation), the public will be afforded ample protection against improper or unscrupulous interception.

S. Rep. No. 541, 99th Cong., 2d Sess. 17 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3571-72 ("Senate Report").

Of course, Pearl probably does not have as weighty a First Amendment right to record his conversations with basketball recruits like Thomas and pass them on to the NCAA as the First Amendment right of Geraldo Rivera (the reporter in *Boddie*) to record conversations with public figures and then publish the conversations. Nonetheless, the Senate Report shows that the 1986 amendment to § 2511(2)(d) exempts a party to a conversation from liability for recording that conversation unless the purpose for recording the conversation was the commission of a crime or a tort. *See also Boddie v. ABC*, 881 F.2d 267, 269-70 (6th Cir. 1989) (1986 amendment to § 2511(2)(d) eliminated right of action that existed before the amendment rather than merely clarifying existing law).

It follows that in order for Thomas' claim under the federal wiretapping statute to succeed, state or federal law must recognize Pearl's purposes in recording his conversation with Thomas as unlawful. In other words, Pearl's conduct must violate a criminal or civil law independent of § 2511(1). As examples of purposes that would make a party to a conversation liable for recording that conversation, the Senate Report lists "blackmail" and "defamation." *See e.g.* 18 U.S.C. § 873, 875(d); *Witby v.*

Associates Discount Corp., 59 Ill. App. 2d 337 (1965). Thomas argues that Pearl's actions caused him to suffer all kinds of vague and unidentified injuries, such as interfering with Thomas' "advantage" and thrusting him into "public notoriety." Even assuming the existence of these injuries, aside from the alleged violation of the federal wiretapping statute and the Illinois Eavesdropping Statute,[3] Thomas has not alleged, nor provided evidence of any unlawful conduct by Pearl. Since Pearl was a party to the conversation with Thomas, Pearl is exempt from liability the under federal wiretapping statute.

II. The Illinois Eavesdropping Statute

Ill. Rev. Stat. ch. 38 para. 14-2 provides:

> A person commits eavesdropping when he:
>
> (a) Uses an eavesdropping device to hear or record all or any part of any conversation unless he does so (1) with the consent of all of the parties to such conversation or (2) in accordance with [certain criminal provisions not at issue here]; or
>
> (b) Uses or divulges . . . any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.

At Paragraph 14-6, the Illinois Eavesdropping Statute provides civil remedies to parties to a conversation who are injured by eavesdropping.

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[3] The court holds in the second part of this order that Pearl did not violate the Illinois Eavesdropping Statute.

Pearl first argues that the Illinois Eavesdropping Statute does not apply to his conduct because he recorded the conversation while he was in Iowa, and in Iowa his conduct was not unlawful. It is unclear whether the Illinois Eavesdropping Statute applies when the party who records the conversation is outside of Illinois and the other party to the conversation is in Illinois. Pearl relies on *People v. Barrow,* 133 Ill.2d 226 (1989). In that case, an Illinois court refused to suppress testimony that was the product of eavesdropping when the conversation that was recorded occurred entirely within Maryland and when recording the conversation was legal in Maryland. The court held that even if it would have been illegal to record the conversation in Illinois, "[s]ince the eavesdropping was conducted entirely within the borders of Maryland, there can be no violation of section 14-2. *Id.* at 257. *Barrow,* however, is not conclusive in deciding this case because Thomas was using the telephone in Illinois when Pearl recorded the conversation from Iowa.

People v. Accardo, 195 Ill. App. 3d 180 (1990) is also inapposite to the facts of this case. In *Accardo,* an informant in Oklahoma placed calls to the defendant in Illinois and Oklahoma authorities tape recorded the conversations. In so doing, the Oklahoma authorities complied with Oklahoma law but not with Illinois law. The court refused to suppress the tape recordings. According to the court, "[t]he policy behind the exclusionary rule . . . is not forwarded by suppression of evidence obtained by others in conformance with laws governing their conduct." *Id.* at 190. Thomas correctly points out, however, that in applying the exclusionary rule, the court in *Accardo* only considered whether excluding the evidence would deter

future improper police conduct; the court did not consider the defendant's interest in not having the recordings used against him. However, the civil remedies for violations of the eavesdropping statute are designed not only to deter improper conduct but also to compensate injured plaintiffs. Just because the court in *Accardo* refused to suppress a tape which was recorded out of state, that does not necessarily mean that there is no civil liability in this case when a recording was made under similar circumstances.

The court, however, need not decide whether the Illinois Eavesdropping Statute applies to Pearl's conduct because the Supreme Court of Illinois has said that under that statute, Pearl cannot be liable. In *People v. Beardsley*, 155 Ill.2d 47, 56 (1986), the court held that eavesdropping does not occur when the person recording the conversation is either a party to the conversation or known by the participants to the conversation to be present. The court reasoned that:

> the eavesdropping statute was intended to protect individuals from the *surreptitious* monitoring of their conversations by the use of eavesdropping devices. As [prior cases] demonstrate, the statute is based on the assumption that if the parties to a conversation act under circumstances which entitle them to believe that the conversation is private and cannot be heard by others who are acting in a lawful manner, then they should be protected in their privacy.

Id. at 53 (emphasis in original). In *Beardsley*, the defendant sat in the back seat of a police car while officers conversed in the front seat. Unbeknownst to the officers, the

defendant tape recorded their conversation. The court held that the defendant could not be guilty of eavesdropping because the officers, knowing that the defendant was listening in the back seat, had no expectation that their conversation was private. "Because the defendant witnessed the responses of the officers, he would have been competent to testify thereto and to describe the same. Hence, the defendant's recording of the officers' conversations was not to obtain information which was otherwise inaccessible." *Id.* at 58. *See also Bender v. Board of Fire & Police Commissioners,* 183 Ill. App. 3d 562, 563 (1989) ("*Beardsley* held . . . that the eavesdropping statute did not prohibit the recording of a conversation by a party to the conversation."). *People v. Cole,* 186 Ill. App. 3d 1002, 1006 (1989) ([In *Beardsley*] the supreme court expressed its reasoning that a party to a conversation cannot be accused of listening secretly to what is said in private, or of surreptitiously intercepting a private conversation, because that party is competent to testify concerning the contents of the conversation, and could have taken notes or transcribed the conversation, rather than record it."). *Smith v. Associated Bureaus, Inc.,* 177 Ill. App. 3d 286 (1989) (applying *Beardsley* to a civil case).[4]

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[4] The court is aware that the Illinois Appellate Court's decision in *People v. Accardo,* 195 Ill.App.3d 180 (1990) seems to conflict with *Beardsley.* The court in *Accardo* observed that had the Illinois Eavesdropping Statute applied, the Oklahoma officer's conduct in recording the conversations would have been in violation of that statute even though there was consent by one party to the conversations. *Id.* at 189. The court in *Accardo* did not discuss *Beardsley,* which this court views as a controlling precedent.

Thomas argues that Pearl violated the Illinois Eavesdropping Statute because that statute, on its face, prohibits the recording of any conversation unless *all* of the parties to the conversation consent, and Thomas did not consent to Pearl's recording their conversation. *Beardsley*, however, rules out that argument, and this court must follow *Beardsley*. Thomas also tries to distinguish this case from *Beardsley* on the ground that *Beardsley* involved only the recording of a conversation and this case involves both recording and disclosure. That argument is without merit. *Beardsley* focused not on the method of the alleged violation, but on whether the party intercepting the conversation legitimately had access to that conversation. Under *Beardsley*, if a conversation is not private, then disclosing the contents of that conversation, whether verbally or by distributing a tape, cannot be unlawful. It would not make sense for the court to find that recording the conversation was lawful but that under the same statute, disclosing the recording was not. Because Pearl was a party to the conversation with Thomas, Pearl lawfully could repeat or report the words spoken even without recording them. Under *Beardsley*, he was entitled to record the conversation and disseminate the tapes.

IT IS THEREFORE ORDERED that the defendant's motion for summary judgment (docket #16) is GRANTED. The clerk shall enter judgment in favor of the defendant and against the plaintiff and for costs of suit. The plaintiff's Motion to Withdraw Subpoena (docket #30) and his Motion For Leave to File Instanter (docket

#29) are moot. The NCAA's Motion to Quash (docket #26) is also moot.

Enter this 1st day of July, 1992.

/s/ Harold A. Baker
HAROLD A. BAKER
UNITED STATES DISTRICT JUDGE

EXHIBIT D

18 U.S.C. 2510

2510. *Definitions*

As used in this chapter –

* * *

(4) "intercept" means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.

* * *

18 U.S.C. 2511

2511. *Interception and disclosure of wire, oral, or electronic communications prohibited*

(1) Except as otherwise specifically provided in this chapter any person who –

(a) intentionally intercepts * * * any wire, oral, or electronic communication;

(b) intentionally uses . . . any electronic, mechanical or other device to intercept any oral communication when –

* * *

(iii) such person knows, or has reason to know, that such device or any component thereof has been sent through the mail or transported in interstate or foreign commerce . . .

(c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a

wire, oral, or electronic communication in violation of this subsection; or

(d) intentionally uses, or endeavors to use, the contents of any wire, oral or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;

shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

* * *

(2)

(c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

18 U.S.C. 2520

2520. *Recovery of civil damages authorized*

(a) **In general.** – Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

(b) **Relief.** – In an action under this section, appropriate relief includes –

(1) such preliminary and other equitable or declaratory relief as may be appropriate;

(2) damages under subsection (c) and punitive damages in appropriate cases; and

(3) a reasonable attorney's fee and other litigation costs reasonably incurred.

(c) **Computation of damages.**

* * *

(2) In any other action under this section, the court may assess as damages whichever is the greater of –

(A) the sum of the actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation; or

(B) statutory damages of whichever is the greater of $100 a day of each day of violation or $10,000.

* * *

Supreme Court, U.S.
FILED
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No. 93-672

In The

Supreme Court of the United States

October Term, 1993

DEON L. THOMAS,

Petitioner,

v.

BRUCE PEARL, Individually and in his representative capacity as Assistant Basketball Coach of the University of Iowa,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts erred in granting the Respondent's Motion for Summary Judgment because the Petitioner failed to demonstrate a genuine issue of material fact on whether the Respondent violated 18 U.S.C. § 2511.

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STATUTES INVOLVED

18 U.S.C. § 2511 provides in relevant part:

(1) Except as otherwise specifically provided in this chapter any person who –

> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> * * *
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection; * * *

shall be punished * * *

* * *

(2) * * * (c) It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire, oral, or electronic communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception.

(d) It shall not be unlawful under this chapter for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the

purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State.

STATEMENT OF THE CASE

The Petitioner, Deon Thomas, filed a complaint in Illinois state court in July, 1991 alleging that Respondent, Bruce Pearl, individually and in his representative capacity as assistant basketball coach of the University of Iowa, had violated 18 U.S.C. § 2511 by tape-recording a telephone conversation between Thomas and Pearl.

During the Spring of 1989, Thomas was a student at Simeon High School in Chicago, Illinois. Pearl was an assistant basketball coach at the University of Iowa in Iowa City, Iowa. During the Spring of 1989, Pearl contacted Thomas in an attempt to recruit Thomas to attend the University of Iowa on a basketball scholarship. In 1989, Pearl had frequent telephone conversations with Thomas and other high school athletes whom the coaching staff at the University of Iowa were interested in recruiting. These telephone contacts were usually initiated from Pearl's home in Iowa City, Iowa in the evening because the prospective recruits were involved in high school classes and school activities during normal working hours.

During these conversations, Thomas discussed recruiting contacts which he had received from other interested universities including the University of Illinois. Pearl believed that violations of National Collegiate Athletic Association (NCAA) rules might have occurred

in the recruitment of Thomas by the University of Illinois, and he was becoming concerned about rumors of allegations that the University of Iowa had violated NCAA rules in its recruitment of Petitioner. Pearl discussed his concerns with his superiors at the University of Iowa, including Bump Elliott, the Athletic Director; Fred Mimms, the Associate Athletic Director and NCAA compliance officer; and Tom Davis, the head coach. Prior to April 3, 1989, Fred Mimms provided Pearl with a Lanier tape recorder with a telephone attachment, to record statements of Thomas, his friends and family, to document their descriptions of recruiting activities.

Between April 3, 1989 and July 3, 1989 Pearl recorded eleven telephone conversations including one conversation with Thomas. During a conversation with Thomas on April 9, 1989, Pearl discussed the advantages of attending the University of Iowa, such as new facilities, a professional style system in the basketball program, a high graduation rate, getting away from home, and young teammates. Pearl also indicated that the University might be able to help with a good job. They also discussed the pressure of the recruiting process. The University of Iowa reimbursed Pearl for the expense of each of these telephone calls.

During June of 1989, Richard Hilliard, an enforcement officer of the NCAA, came to the University of Iowa and requested any information which the University possessed on the recruitment of Deon Thomas by the University of Illinois. NCAA bylaw, article 19.01.2 requires that representatives of a member institution must fully cooperate and make a full and complete disclosure of all relevant information requested by NCAA enforcement

staff. At the direction of head coach Tom Davis, Pearl played the tape-recorded conversations for Mr. Hilliard in Iowa City, Iowa. He also provided Hilliard with a copy of the memo dated May 5, 1989 which he had written to the athletic director of the University of Iowa, summarizing his knowledge of the recruitment of Thomas.

During August 1989, Richard Hilliard returned to the University of Iowa and requested the tape recordings. At the direction of head coach Tom Davis, Pearl provided the tape recording of telephone conversations to Mr. Hilliard in Iowa City, Iowa.

Only after the NCAA had initiated enforcement action against the University of Illinois for alleged violation of NCAA rules specifically on the recruitment of Thomas, Pearl played the tape recordings for Mike Slive, the attorney for the University of Illinois, at his request and as part of the NCAA enforcement action. The tape was played for Mr. Slive in Iowa City, Iowa. Pearl did not make or authorize any other disclosures of the tape recordings.

On April 6, 1992, Pearl filed a Motion for Summary Judgment, Statement of Undisputed Material Fact and Supporting Memorandum. On April 21, 1992, Thomas filed only a "Statement of Genuine Issues of Material Facts" but without any supporting affidavits or documentation. Thomas simply relied upon the allegations in the complaint.

On July 1, 1992, the district court granted the Motion for Summary Judgment on the ground Pearl acted "under color of law" because he had acted within the scope of his

employment as assistant basketball coach at the University of Iowa. The district court also found, in the alternative, that even if Pearl was not acting under color of law, his actions fell within the exception of 18 U.S.C. § 2511(2)(d). The Court found absolutely no evidence to conclude Pearl acted with the requisite purpose of committing any "criminal or tortious act in violation of the Constitution or laws of the United States or any state." Most importantly, Thomas did not cite *Stockler v. Garratt*, 893 F.2d 856 (6th Cir. 1990), nor encourage the district court to follow its holding.

Thomas appealed to the United States Court of Appeals for the Seventh Circuit on July 16, 1992. Once again, Thomas did not raise the *Stockler* decision or argue its holding in his Brief or Reply Brief. Additionally, Thomas did not urge the Seventh Circuit to modify or abandon its holding in *By-Prod Corp. v. Armen-Berry Co.* The Seventh Circuit held that Pearl did not come within the "under color of law" exception of 18 U.S.C. § 2511. The Seventh Circuit was unable to clearly define the meaning of "under color of law" but nevertheless held that it did not apply to Pearl. However, the court did find that the exception of 28 U.S.C. § 2511(2)(d) was applicable to Pearl's conduct. There was no genuine issue of fact or any evidence in the record to suggest an alleged "purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or any state." The Seventh Circuit denied Thomas' motion for rehearing on July 30, 1993. Once again Thomas did not raise the holding in the *Stockler* decision nor did he request the court to reconsider its decision in *By-Prod Corp.* On this record, Thomas filed his Petition here.

SUMMARY OF THE ARGUMENT

This Court should deny the Petition for Writ of Certiorari. The asserted conflict between the circuits which Thomas attempts to use as a basis for granting certiorari was not raised nor preserved in the lower courts. Even if this Court finds that the issue was properly raised, the conflict between the circuits does not exist on whether 18 U.S.C. § 2510, *et seq.*, creates a privacy interest which would serve as a basis for denying the exemption of 18 U.S.C. § 2511(2)(d). Further, the lower courts properly analyzed the complaint in relation to the elements necessary to constitute tortious actions under state law. Thomas failed to adequately resist the motion for summary judgment because he did not present any evidence which would support his claims. Even if this Court could find that the lower courts had misinterpreted 18 U.S.C. § 2511(2)(d), Pearl came within the exemption of 18 U.S.C. § 2511(2)(c) because he was acting under color of law when he tape-recorded his conversation with Thomas.

REASONS FOR DENYING THE WRIT

WHETHER THE LOWER COURTS ERRED IN GRANTING THE RESPONDENT'S MOTION FOR SUMMARY JUDGMENT BECAUSE THE PETITIONER FAILED TO DEMONSTRATE A GENUINE ISSUE OF MATERIAL FACT ON WHETHER THE RESPONDENT VIOLATED 18 U.S.C. § 2511.

A. Thomas did not properly raise and preserve the issues.

Thomas seeks review of the Seventh Circuit decision because of an alleged conflict between the decision of the Seventh Circuit in *By-Prod Corp. v. Armen-Berry Co.*, 668 F.2d 956 (7th Cir. 1982) and the Sixth Circuit in *Stockler v. Garratt*, 893 F.2d 856 (6th Cir. 1990). Thomas has not properly preserved this issue. *Delta Airlines v. August*, 450 U.S. 346, 362 (1981); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). Thomas did not request either of the lower courts to modify the holding of the Seventh Circuit in the *By-Prod Corp.* decision. Thomas did not argue that the Court should follow a different standard, and he did not cite to the *Stockler* decision by the Sixth Circuit. This issue is being raised for the first time before this Court. The Petition should be denied for this reason alone.

B. The Seventh Circuit correctly interpreted 18 U.S.C. § 2511(2)(d).

This Court has held that the Fourth Amendment does not create or protect a privacy interest which is infringed by the taping or monitoring of telephone conversations by a participant in the conversation. *Lopez v. United States*, 373 U.S. 427 (1963). The subsequent enactment of the

Federal Wiretapping Statute, (18 U.S.C. § 2510, *et seq.*), adheres to the holding of *Lopez* except for a very limited circumstance. The statute provides that taping of a telephone conversation by a participant who is acting "under color of law" does not constitute a violation. 18 U.S.C. § 2511(2)(c). It further provides that any participant who is not acting under color of law may tape-record the conversation unless the tape recording is made "for the purpose of committing any criminal or tortious act in violation of the Constitution or the laws of the United States or any state." 18 U.S.C. § 2511(2)(d). When these two sections are read together, it is clear that Congress intended to restrict the activities of a party to the conversation only to a limited degree.

Thomas' argument that the Seventh Circuit has misinterpreted the law by ignoring a privacy interest created by the statute is circular. He argues that the statute itself creates a privacy interest which is then tortiously invaded if a conversation is recorded without the consent of the other parties. This interpretation renders the intent portion of § 2511(2)(d) meaningless. This theory would subsume all the exceptions which are expressly contemplated by the statute. Otherwise stated, Thomas argues that the statute is violated unless all parties have consented to the tape recording of a phone conversation by a participant. The explicit language of the statute simply does not support such an interpretation.

Thomas' contention that the decision by the Seventh Circuit in *By-Prod Corp.*, 668 F.2d 956 (7th Cir. 1982), was incorrect for discussing each of the possible bases for

asserting unlawful action is misplaced. In order to determine whether a participant acted with a purpose to commit a criminal or tortious act, the court must view the challenged actions in light of the appropriate standard for the tort which was alleged. If the alleged actions of an individual would not at least support a cause of action for the underlying tortious or criminal act, it is very difficult to argue that the individual acted with a tortious or criminal intent. In fact, Thomas can find no support in the decision of the Sixth Circuit in *Stockler*, 893 F.2d at 856. In *Stockler*, as the federal statute directs, the Sixth Circuit expressly analyzed the requirements of the state blackmail statute to determine whether the undisputed facts would allow an inference to be drawn which would constitute blackmail under "the laws of . . . any state." *Stockler v. Garratt*, 893 F.2d 856, 859 (6th Cir. 1990). Had the issues been timely raised, the Seventh Circuit would have found no conflict between the Circuits. The Petition must be denied for this reason.

C. The lower courts correctly concluded that there was no genuine issue of material fact which precluded judgment for Pearl.

Thomas argues that the evidence was sufficient to demonstrate that Pearl intended to injure him in a tortious manner by placing him in a false light. This position cannot be supported by this record on summary judgment.

A Motion for Summary Judgment must be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.

Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party seeking summary judgment must inform the court of the basis for its motion and identify those portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with any affidavits, which demonstrate the absence of a genuine issue of material fact. *Id.* at 324. A party resisting a motion for summary judgment may not merely rely upon his pleadings. *Id.* The non-moving party must by his own affidavits or by the depositions, answers to interrogatories and admissions on file identify specific facts showing that there is a genuine issue for trial. *Id.* In *Celotex*, this Court stated:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case, and on which the party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of non-moving party's case necessarily renders all other facts immaterial. *Id.* at 322-323.

One of the principal purposes of the rules providing for summary judgment is to isolate and dispose of factually unsupported claims or defenses. *Id.* at 322-324.

Thomas failed to resist the motion for summary judgment with specific facts, and with reference to discovery or affidavits. He merely relied upon the complaint which is wholly insufficient to generate a genuine issue of fact.

Thomas asks this Court to assume there is any evidence to support his allegation that the recording of the telephone conversation in question was false or that Pearl had any knowledge of such falsity. There is not even an affidavit by Thomas asserting that the statements in the telephone conversation were false or that the conversation somehow placed him in a false light. There is no evidence in the record which supports this contention. The absolutely undisputed facts are that Pearl was concerned about documenting statements made by Thomas his family and friends concerning the recruiting activities of the University of Illinois. He was concerned about rumors and allegations that the University of Iowa had violated NCAA rules in its recruitment of Thomas. There are no other facts before the Court which support any other contention. This failure on "an essential element of his case" dooms his Petition.

Thomas attempts to side-step the failure to create a record by asserting that he was manipulated by Pearl. These arguments were not asserted or supported before the district court and simply represent an attempt to belatedly manufacture a position which he was unable to support or did not support in his resistance to the motion for summary judgment. In short, Thomas did not properly raise and identify genuine issues of fact because he could not. His Petition to review this record should be denied.

D. Pearl did not violate 18 U.S.C. § 2511 because he acted under color of law.

18 U.S.C. § 2511 provides that it is not unlawful for a person acting under color of law to intercept a telephone communication where that person is a party to the communication. 18 U.S.C. § 2511(2)(c). An individual acts under color of law when he is clothed with the authority of the state and acting in the performance of his official duties. *See, Monroe v. Pape*, 365 U.S. 167, 184 (1961); *United States v. Classic*, 313 U.S. 299 (1941).

The undisputed facts demonstrate that Pearl was always acting within the scope of his employment as assistant basketball coach at the University of Iowa when he tape-recorded the conversation with Thomas. His job responsibilities at the University of Iowa included recruiting prospects for the University of Iowa basketball team. He had been involved in recruiting Thomas since December, 1988. During his frequent telephone conversations with Thomas, they discussed recruiting contacts which Thomas had received from other interested universities including the University of Illinois. Pearl believed that recruiting violations had been committed by the University of Illinois. Pearl had also heard rumors of allegations that he had violated NCAA rules as well. He discussed his concerns with his superiors, and he was directed to document his contacts with Thomas. He was provided with a tape-recorder with a telephone attachment to record statements concerning recruiting activities for Thomas.

On April 9, 1989 Pearl tape-recorded his telephone conversation with Thomas. During that telephone conversation Thomas referred to him as "coach." They discussed Thomas' desire to attend the University of Iowa. Pearl pointed out the advantages of attending the University of Iowa. The contents of the telephone conversation in question indisputably demonstrate that it was made by Pearl in connection with his attempts to recruit Thomas to attend the University of Iowa on a basketball scholarship.

Thomas concedes the point in his Complaint. He asserts Pearl acted "in his representative capacity as assistant basketball coach for the University of Iowa" as well as his individual capacity. The Complaint alleges that Pearl recorded telephone conversations "in his representative capacity as assistant basketball coach for the University of Iowa" and that he disclosed the contents of that conversation "in his representative capacity as assistant basketball coach at the University of Iowa." Thomas' counsel acknowledged that Pearl recorded his conversations while he was acting as assistant basketball coach.

> Acting in the scope of his employment as assistant basketball coach, he tape-recorded certain telephone conversations with my client, my client's family, acquaintances of my client and others.

(Defendant's Statement of Undisputed Fact and Affidavit of Doug Young). No other facts were offered.

Consistently, Thomas offered the wholly unsupported assertion that "self-imposed limitations by educational institutions, and perhaps universal limitations as to institutions in general," delimit "recruiting" and by that

definition, excludes Pearl. No evidence from other institutions was offered which would place tape-recording a telephone conversation with a recruit as being outside the scope of recruitment.

Similarly, the disclosure of the tape recording was also in the course of Pearl's employment as assistant basketball coach at the University of Iowa. NCAA Enforcement Officer Richard Hilliard came to the University of Iowa in June, 1989 and requested information that the University of Iowa might have concerning the recruitment of Thomas by the University of Illinois. This request was made as part of an NCAA investigation. Pearl allowed Mr. Hilliard to listen to the tape-recorded conversations at the direction of head coach Tom Davis. Mr. Hilliard returned to the University of Iowa during August, 1989 and requested that he be provided with the tape recordings. Again at the direction of Head Coach Tom Davis, Pearl provided the tape recording of the telephone conversations to Mr. Hilliard. The undisputed facts demonstrate Pearl was acting within the scope of his employment at all times. For this additional reason, his Petition must be dismissed.

CONCLUSION

This case presents no special and important reason to grant Certiorari.

The Seventh Circuit Court of Appeals properly upheld the district court's order granting Pearl's Motion for Summary Judgment. Thomas did not adequately generate genuine issues of fact in resistance to the Motion for

Summary Judgment and failed to preserve the issue of the proper interpretation of 18 U.S.C. § 2511 in the lower court. Pearl's Motion for Summary Judgment was properly granted. The Petition for Writ of Certiorari must be denied.

Respectfully submitted,

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